UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY JUDGMENT ON ENTITLEMENT DENIED:
April 29, 2022

CBCA 6650

WILLIAMS BUILDING COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Kevin M. Cox of Camardo Law Firm, P.C., Auburn, NY, counsel for Appellant.

Jeffrey A. Regner and Randal W. Wax, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **VERGILIO**, and **O'ROURKE**.

LESTER, Board Judge.

Appellant, Williams Building Company, Inc. (WBC), seeks summary judgment in its favor on entitlement. It asserts that, as part of a settlement agreement resolving two other contract claims that WBC had previously submitted to the Department of State's Office of Overseas Building Operations (OBO), the OBO contracting officer conceded that WBC's contract breach claim was valid and bound OBO to pay some as-yet-undefined damages amount for that breach. Because the language in the settlement agreement to which WBC cites does not concede liability for breach, we deny WBC's motion.

Background

WBC's Submission of Claims

On June 15, 2016, WBC entered into a firm fixed-price contract, contract no. SAQMMA-16-C-0015 (the contract), with OBO for a tenant retrofit in an office building in Wuhan, China, that was expected to serve as an office of the United States Consulate. The contract anticipated contract completion by June 10, 2018. After various delays before and during contract performance, OBO and WBC entered into contract modification no. P00008, which extended the completion date to December 31, 2018; provided monetary compensation to WBC for past delays and anticipated future work; and contained WBC's written release of claims predating February 22, 2018.

Beginning in late November 2018, WBC submitted what became a series of separate, but somewhat overlapping and seemingly duplicative, requests for additional monies and time extensions under the contract. Ultimately, the various submissions culminated in the following three claims:

WBC's Customs Storage Fees Claim. On February 9, 2019, WBC submitted a claim to the OBO contracting officer seeking storage fees associated with a shipment of construction materials that WBC had to pay after the Government of China completed a customs review and clearance process. That claim incorporated a previously-submitted proposed change order (PCO), PCO 067.

WBC's Time-Related Cost Claim. On May 9, 2019, WBC submitted a certified claim for time-related cost adjustments (Appeal File, Exhibit 62[1]) in which it sought compensation for delays and associated time-related costs. This claim incorporated and expanded upon previously-submitted PCO 075. Through the claim, WBC sought a time extension of 341 days beyond December 31, 2018 – part of the extension was for excusable delays and part was for compensable delays – and sought an equitable adjustment of $3,203,679.38 in time-related costs.

WBC's Cardinal Change/Implied Duty Breach Claim. WBC submitted a second certified claim on May 9, 2019, seeking damages for an alleged cardinal change to its contract and OBO's alleged breach of the implied duty of good faith and fair dealing. In its claim, WBC repeatedly referenced and essentially incorporated an earlier request for equitable adjustment (REA) dated November 29, 2018, and indicated that

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[1] Unless otherwise noted, all exhibits cited in this decision are contained within the appeal file.

> its breach damages were $5,493,264, a figure that WBC asserted "[e]xcludes all costs subject to Time Related Cost Proposal." Exhibit 63 at 1095. Other than an exhibit attached to the claim breaking down over $17 million that WBC had spent on the contract, there was nothing in the claim that identified specifically what costs were encompassed within that $5,493,264. Although WBC disavowed seeking any time-related costs through the breach claim, a timeline attached as exhibit no. 5 to the breach claim identified calendar days of delay that WBC thought were OBO's responsibility.

The OBO contracting officer denied the customs storage fees claim by decision dated March 31, 2019. On August 13, 2019, the OBO contracting officer issued a single, consolidated final decision denying both of the May 9, 2019, claims.

The Parties' Settlement

On September 28, 2019, the parties executed bilateral modification no. P00020 (mod-20 or the modification) settling WBC's "delay impact" claim for time delays and WBC's claim for customs storage fees in exchange for an agreed-upon payment of just under $5 million. The parties indicated in the modification that they did not resolve, and expressly left open for further negotiation, WBC's cardinal change/breach claim, as follows:

> This [modification] is for time delays experienced on the project related to design changes and a project shutdown caused by security concerns when the general contractor changed their major local subcontractor. The contractor has three open certified legal claims related to customs storage fees, time delays, and cardinal changes to the contract. This [modification] represents a partial settlement of the first two of these claims. Time delays compensated by this [modification] are related to the following changes during construction. This [modification] addresses PCO 067 Storage costs related to customs warehousing of critical materials -$185,663.90. PCO 075 Additional Time related Costs -$4,578,004.66 [Total: $4,763,668.56]. Bond Cost for the preceding of $235,657.17 to cover contract extension to new end date of 29 February 2020. [Grand total: $4,999.325.73]. *Additional funding to settle the Breach of Contract claims will be requested when additional funds are available*.

Exhibit 22 at 312-13 (emphasis added). The parties further agreed in the modification that PCOs 067 and 075 were fully resolved and released, as follows:

> 1. PCO 067 – Additional Storage Costs
> Scope of Work: Government to provide reimbursement to the contractor for additional storage costs in China resulting from customs clearance delays.
> Amount: $185,663.90 (No [Value-Added Tax (VAT)])
> Time Extension: included in no. 2 below
>
> 2. PCO 075 – Time Extension
> Scope of Work: Period of performance is extended from January 1, 2019 up through February 29, 2020. 358 days are compensable, 67 days non-compensable. (425 days total).
> Amount: $4,813,661.83 – ($4,578,004.66 extended overhead costs + $235,657.17 costs) (No VAT)
> Time Extension: None
>
> **Contractor's Release**
> In consideration of the modification agreed to herein as a complete equitable adjustment in the amount of $4,999,325.73, WBC hereby releases the Government from any and all liability for further requests for equitable adjustments, claims or demands attributable to the facts or circumstances set forth in WBC's above-referenced PCOs [067 and 075].

Id. at 315.

Proceedings Before the Board

On November 8, 2019, WBC filed with the Board an appeal of "the portion of the Contracting Officer's Final Decision dated August 13, 2019, . . . denying its claim, as amended, for breach of contract/cardinal change/defective specifications/breach of implied duty of good faith and fair dealing." Notice of Appeal at 1. WBC indicated in its notice that "[t]his appeal does *not* include the items negotiated and settled between the parties in Bilateral Modification No. P00020 in the amount of $4,999,325.73 (PCOs 067 and 075), which are specifically *excepted out* of this appeal," although WBC did not include any kind of breakdown of the costs that were being claimed as part of this appeal or identify the total amount that it was seeking. Proceedings in this appeal, inclusive of discovery, have focused on OBO's efforts to learn what costs WBC is claiming in this appeal that differ from what was a part of the time-related claim that was settled through mod-P20.

During the discovery process, WBC filed a motion seeking summary judgment on entitlement to damages under its cardinal change and implied duty breach claim, arguing that mod-P20 is "an express agreement as to entitlement regarding Appellant's breach claim

which is the subject of this appeal." Appellant's Reply Brief at 2. This decision addresses that motion.

Discussion

WBC argues that the OBO contracting officer, by signing a bilateral contract modification (mod-P20) in which he agreed to request "[a]dditional funding to settle the Breach of Contract claims . . . when the additional funds are available," conceded that OBO had breached WBC's contract. It says that, in mod-20, "the Government agreed that it *would* pay Appellant for its breach claim *when* the funding became available." WBC seeks summary judgment in its favor as to entitlement on its breach claim, leaving only the amount of recoverable damages to be decided in further proceedings.

"The starting point for contract interpretation is 'the plain language of the agreement.'" *Belle Isle Investment Co. v. General Services Administration*, CBCA 4734, 18-1 BCA ¶ 37,022 (2017) (quoting *Foley Co. v. United States*, 11 F3d 1032, 1034 (Fed. Cir. 1993)). We must "interpret the contract in a manner that gives meaning to all of its provisions and makes sense." *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). If the "provisions are clear and unambiguous, they must be given their plain and ordinary meaning." *Id.* (quoting *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993)). Even if a particular provision is ambiguous, the ultimate interpretation adopted cannot conflict with or be unreasonable in light of the actual written language. *See P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1356 (Fed. Cir. 2002) ("[A] contractor's interpretation of a latent ambiguity will only be adopted if it is found to be reasonable." (quoting *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 n.6 (Fed. Cir. 1993)).

Whatever the purpose of the reference to settlement funding, it is clear that OBO did not, through it, concede entitlement on WBC's breach claim or affirmatively obligate itself to pay damages on that claim. To the extent that the agreement requires the contracting officer to request settlement funds, it does not require OBO actually to *provide* funding simply because the request is made or force a settlement if the parties cannot mutually agree to acceptable terms. This agreement to seek settlement funding is not, in and of itself, a concession of liability. *See Chaparral Industries, Inc.*, ASBCA 34396, 91-2 BCA ¶ 23,813 ("[A] promise to use [certain] test results in the 'resolution' of the claim fell far short of an admission of legal liability contingent on those results" and "at most created an obligation to attempt in good faith to negotiate a settlement of the claim, if the . . . value derived from the test under the agreed formula exceeded the agreed threshold."), *aff'd sub nom. Chaparral Industries, Inc. v. Rice*, 975 F.2d 870 (Fed. Cir. 1992) (table).

To the extent that, as WBC appears to suggest, the sentence about seeking the settlement funding in question might be ambiguous, we normally could look to extrinsic evidence to assist in interpreting it. *Metropolitan Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006). Here, though, WBC has not identified any extrinsic evidence in its motion to support its interpretation, leaving us with nothing to consider. In any event, even if WBC had presented evidence suggesting that OBO intended to concede liability on the breach claim, such evidence would conflict with the actual language in mod-P20, precluding our reliance on it. *See Coast Federal Bank v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003) (holding that a party "cannot rely on extrinsic evidence to interpret [contract phrases] to contradict the plain language of the Agreement").

Because the Government has not conceded liability through mod-P20, WBC cannot rely on that modification to avoid having to prove that OBO actually breached its contract. To prevail on its cardinal change/implied duty breach claim, the contractor will bear the burden of demonstrating liability, causation, and resultant injury. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991); *see Raytheon Co. v. United States*, 747 F.3d 1341, 1352 (Fed. Cir. 2014) ("[A] contractor seeking an equitable adjustment for increased costs has the burden of proving entitlement and quantum to its claim.").

Decision

For the foregoing reasons, WBC's motion for summary judgment as to entitlement is **DENIED**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge